IN THE HIGH COURT OF JUDICATURE OF BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.828 OF 2005

1. Rajesh @ Dadya Vijay Patil,
   Age: 28 yrs, R/o.Shantabai
   Niwas, Farman Naka, Bazarpeth, ..Appellant No.1.
   Kalwa, Thane. (Orig.Accused No.1)
   At present at Central Jail,Thane.

2. Suresh Hira Mhatre,
   Age:33 years, R/o Hira Mhatre
   Bldg. Kumbhar Alli, Behind
   National Hotel, Kalwa,Thane. ..Appellant No.2.
   At present at Central Jail,Thane(Orig.Accused No.2)

V/s.

State of Maharashtra, ..Respondent
(Through Sharad Boja Shetty) (Orig.Complainant)

Mr.S.M.Oak with Shri V.D.Patil for Mr.Ambar Joshi for appellants.

Mr.S.S.Tatkare, APP for Respondent-State.

CORAM: A.M.KHANWILKAR,J

DATE : DECEMBER 5, 2006.

ORAL JUDGMENT :

1. This appeal takes exception to the Judgment and Order passed by the IV Ad-hoc Addl. Sessions Judge, Thane dated August 1, 2005 in Sessions Case No.306 of 2004. The appellants/accused Nos. 1 and 2 were prosecuted for the offence punishable under sections 307, 324, 452,427 and 120B of I.P.Code. The trial Court by the impugned Judgment and Order has convicted the appellants for offence punishable under

section 307 r/w 34, 324 r/w 34, 452 r/w 34, 427 r/w 34 of I.P.Code.

2. Briefly stated, the prosecution case is that on the night between 31st December, 2003 and 1st January, 2004, Onkar Pawar(P.W.4) was assaulted by the appellant No.1 alongwith three other associates. The other three associates are stated to be Guru, Sarfaroz, Gautam @ Sunil Rokade, who are absconding accused. The incident of assault has been witnessed by Sharad Shetty(P.W.1). In fact, even P.W.1 has been assaulted and his articles in the house were destroyed during the said incident. It is not necessary to advert to the entire evidence on record. Suffice it to observe that the trial Court has extensively referred to the evidence of P.W.Nos. 1 to 4 and 5. In so far as P.W.4 and 1 are concerned, they are the injured witnesses and have been assaulted by the Appellant No.1/accused No.1 and his associates.

3. After considering the rival submissions, I am of the view that the analysis done by the trial Court of evidence of P.W.1 and P.W.4 is a possible view; and a correct approach adopted by the trial Court. The finding reached on the basis of that analysis

warrants no interference. The P.W.4 has spoken about the manner in which he was assaulted by accused No.1 and one Surfaroz. The P.W.1 has deposed that he had seen the actual assault on P.W.4 by accused No.1 and three associates. That version of P.W.1 has remained unshattered. The cross- examination of both these witnesses only succeeds in bringing on record some contradictions and descripancies which however, do not affect the material evidence regarding the incident of assault on P.W.4 and P.W.1. Evidence of P.W.4, who has been assaulted by the accused No.1 and his associates, is corroborated by the evidence of P.W.1, who is the eye-witness. The injuries which are sustained by these witnesses-P.W.4 and P.W.1 have been proved in the evidence of Dr.Rajesh Adhav(P.W.2), who has examined both these witnesses immediately after the incident. As mentioned earlier, the conclusion reached by the trial Court about the version given by the P.W.1 and P.W.4 to be trustworthy and truthful, that will have to be accepted.

4. According to the counsel for the appellant however, the trial Court has clearly missed the crucial aspect of the matter while considering the case against accused No.2. The prosecution case

against accused No.2 is that he had instructed accused No.1 and other associates to proceed towards the scene of offence and to assault Bala & Sanjay. This version is given by P.W.4. However, in fact, the accused No.1 and other associates on reaching the scene of offence have not assaulted Bala and Sanjay as they had escaped from the scene of offence. The accused No.1 and other associates however, assaulted P.W.4 and P.W.1. In this backdrop, counsel for the appellant/accused No.2 would contend that the theory of conspiracy which is invoked by the prosecution, so as to hold accused No.2 responsible for the alleged offence, will have to be discarded as has been rightly observed by the trial Court. Besides, it would be inappropriate to proceed against accused No.2 by applying section 34 of I.P.Code, as has been done by the trial Court. This is so because, there is no legal evidence on record to even remotely suggest about the participation of accused No.2 in the incident in question, of assault on P.W.4 and P.W.1. In such a case, accused No.2 cannot be proceeded against by applying section 34 of I.P.Code. Neither the accused No.2 can be proceeded for other offences committed at the relevant time by accused No.1 and his associates by applying section 34 of I.P.Code. There is substance in this argument. In

that sense, the appeal of accused No.2 ought to succeed. Thus understood, the appeal would succeed to the extent of appellant No.2/accused No.2 only.

5. However, in so far as appellant No.1/accused No.1 is concerned, as is mentioned earlier, the prosecution has proved beyond doubt the involvement of accused No.1 in the commission of the offence. The prosecution witnesses P.W.4 and P.W.1 are the victims of the said incident and have deposed against accused No.1 and have spelt out the role of accused No.1, attributing overtact. So far as accused No.1 is concerned, injuries suffered by the prosecution witnesses P.W.4 and P.W.1 have been proved in evidence by P.W.2 Dr.Adhav. P.W.4 has sustained in all seven injuries. Six of them are incised wounds on different parts of the body. One injury is stated to be fracture of Tibia-fibula right side. Evidence of P.W.2 also indicates that the injuries-1,2, 4 and 5 were grievous in nature. The injury certificate Exh. 28 is proved in evidence. Indeed, the P.W.2 has deposed that injuries Nos. 1 and 5 were possible while guarding himself in an attack. It is however, opined that at the site of Injury No.1 there are vital artilleries and was sufficient to cause death in ordinary course of nature. The P.W.2 has also

deposed that if all injuries are put together and not treated in time would have caused death of Onkar Pawar. P.W.2 has also deposed that Onkar Pawar(P.W.4) was admitted in hospital for about 15 days and at the relevant time he was in serious condition. P.W.2 has also opined that injuries were possible by choppers and sword.

6. Having regard to the nature of injuries suffered by P.W.4, it was argued on behalf of the appellant No.1/accused No.1 that the said accused had no intention to murder the P.W.4 and the injuries were not on the vital part of the body so as to result in death. On this basis, it was contended that the trial Court committed manifest error in applying section 307 of I.P.C. The argument seems to be attractive. Even assuming that the appellant No.1 had no intention to murder P.W.4 was to be accepted, for the nature of injuries suffered and as opined by Dr.Adhav (P.W.2), the same were grievous hurt. In such a case, even if the accused No.1 was to be given benefit that would be only of invoking provisions of section 326 of IPC instead of 307 of IPC. In as much as the injuries, which are caused to P.W.4 have been proved to be grievious hurt caused by means of sharp edged weapons used in the commission of the offence

by the accused No.1 and his associates, which was likely to cause death. There is no evidence on record that the appellant has assaulted the P.W.4 or for that matter P.W.1 on account of sudden provocation. In such a case, for the nature of injuries suffered by P.W.4 the offence would be one in any case, under section 326 of I.P.Code. Even if that provision was to be invoked, in the fact situation of the present case that would make no difference to the sentence to be awarded to the accused No.1. For instance, if the finding recorded by the trial Court against the appellant No.1 was to be upheld as it is, the appellant would be proceeded for offence under section 307 of I.P.Code- which offence is punishable with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. In so far as offence under section 326 of I.P.Code is concerned, the same is punishable with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. In other words, punishment that has been awarded by the trial Court, even on invoking section 326 of I.P.Code, will have to be maintained as it is. No serious argument has been canvassed on behalf of the appellant No.1 with regard to the other

offences, for which he has been found guilty by the trial Court.

7. Accordingly, even if the argument of the appellant No.1 that the offence will not be one under section 307 of I.P. Code, but some other offence was to be accepted, in my opinion, at the highest, it would be offence under section 326 of I.P.Code, in which case also the appellant will have to suffer sentence awarded by the trial Court for a period of five years and pay fine of Rs.5,000/- i.d. to suffer further R.I. for one year.

8. Counsel for the appellant No.1 however, would contend that, atleast quantum of sentence should be reduced as the offence is not under section 307 of I.P.Code. This submission does not commend to me. Even if the appellant No.1 was to be held guilty of the offence under section 326 of I.P.Code, will make no difference to the quantum of sentence imposed by the trial Court to the extent of R.I. for five years and to pay fine of Rs.5,000/- i.d. to suffer R.I. for one year. There is no reason to reduce the said sentence imposed by the trial court having regard to the fact situation of the present case. For the seriousness of the injury and the offence involved,

the sentence imposed cannot be said to be excessive or unreasonable. There is no tangible reason why the sentence imposed by the trial Court should be brought down. Accordingly, this submission will have to be rejected.

9. Counsel for the appellant No.1 would then contend that in so far as appellant No.1 is concerned, his family consists of wife and sister who are fully dependent on him. This aspect has been considered by the trial Court in paragraph 28 of the impugned Judgment, while awarding sentence of R.I. for five years and to pay fine of Rs. 5000/- i.d. further R.I. for one year . In my opinion, no fault can be found with the approach of the trial Court for imposing sentence as awarded against the appellant No.1.

10. In the circumstances, this appeal partly succeeds to the extent of the appellant No.2. The impugned Judgment and order holding appellant No.2 guilty of the offences charged against him is set aside. Instead, the appellant No.2/accused No.2 is acquitted of the said charges and ordered to be set at liberty forthwith, unless required in connection with some other offence.

11. The appeal preferred by appellant No.1 however, fails. The same is dismissed.